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<b>JULIE A. TOMLIN FICHTNER, Appellant</b>		)	
		)	
<b>and</b>		)	<b>Docket No. 05-1353</b>
		)	<b>Issued: January 13, 2006</b>
<b>U.S. POSTAL SERVICE, MAIN POST OFFICE,</b>		)	
<b>Milwaukee, WI, Employer</b>		)	
		)	

*Case Submitted on the Record*

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

<sup>1</sup> According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including, *inter alia*, any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (June 2002).

## **FACTUAL HISTORY**

This case has previously been on appeal before the Board. In an October 23, 1998 decision, the Board affirmed an Office hearing representative's October 31, 1996 decision which found that appellant did not sustain a recurrence of total disability on June 25, 1993 causally related to her accepted employment-related bilateral carpal tunnel syndrome and that she did not sustain an emotional condition while in the performance of duty.<sup>2</sup> The facts and the history relevant to the present issue are hereafter set forth.

On December 12, 1984 appellant, then a 28-year-old clerk, filed an occupational disease claim alleging that on December 5, 1994 she first realized that her carpal tunnel syndrome was caused by factors of her federal employment. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and authorized bilateral carpal tunnel release which was performed on March 27, 1985. By decision dated January 19, 1989, the Office granted appellant a schedule award for a 12 percent impairment of the right upper extremity and a 10 percent impairment of the left upper extremity. Thereafter, she accepted the employing establishment's job offer for a limited-duty distribution window clerk position and returned to work on May 18, 1992.

On August 5, 1992 appellant hurt her neck while performing her work duties and by letter dated September 3, 1992, the Office accepted her claim for cervical subluxation. On May 8, 1993 she was involved in a nonwork-related automobile accident and did not return to work.<sup>3</sup>

By letter dated August 25, 1994, appellant informed the Office that she was claiming wage-loss compensation due to the employing establishment's failure to comply with the physical restrictions set forth by Dr. Thomas J. Nordland, her attending Board-certified orthopedic surgeon. In a March 8, 1995 letter, she described how the requirements of the limited-duty position exceeded Dr. Nordland's restrictions.

By decision dated November 21, 1995, the Office denied appellant's claim on the grounds that the evidence of record established that the limited-duty distribution window clerk position was suitable and did not exceed her work limitations. In addition, the Office found that she did not sustain an emotional condition while in the performance of duty. By letter dated November 30, 1995, appellant requested an oral hearing before an Office hearing representative.

In an October 31, 1996 decision, an Office hearing representative affirmed the Office's November 21, 1995 decision. The hearing representative found the evidence of record insufficient to establish that appellant was totally disabled for work beginning June 25, 1993 due to her accepted employment injury. The hearing representative also found the evidence of record

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<sup>2</sup> Docket No. 97-1656 (issued October 23, 1998).

<sup>3</sup> Appellant voluntarily resigned from the employing establishment effective June 25, 1993 based on a January 21, 1994 settlement agreement regarding grievances she filed against the employing establishment who issued letters proposing to remove her from its employment because she failed to keep a regular schedule and to comply with a previous settlement agreement.

insufficient to establish that she sustained an emotional condition while in the performance of duty.

Following the Board's October 23, 1998 decision, appellant, in a March 13, 2005 letter, requested reconsideration. She submitted medical records covering intermittent dates from May 12 through July 15, 1993 which addressed the treatment she received after her May 8, 1993 motor vehicle accident. Appellant also submitted medical reports and treatment notes of Dr. Nordland which covered intermittent dates from August 31, 1992 through March 20, 1995 and addressed her work restrictions and ability to perform the duties of the limited-duty position. In an April 11, 2000 medical report, Dr. Nordland found that appellant still maintained a 12 percent impairment of the right upper extremity and a 10 percent impairment of the left upper extremity. He opined that her current work restrictions were in effect and they were secondary to the above-noted limitations. Dr. Nordland's October 19, 2004 attending physician's report noted the date of injury as December 5, 1984. He diagnosed carpal tunnel problems and indicated with an affirmative mark that these problems were caused by an employment activity. Dr. Nordland stated that appellant experienced persistent carpal tunnel problems in spite of surgical releases.

Appellant submitted correspondence from her vocational rehabilitation counselor, the employing establishment and the Office concerning her ability to perform limited-duty work. In addition, she submitted documents regarding the employing establishment's proposed removal and grievances she filed regarding this action. Appellant submitted a list of jobs and the duties associated with these jobs and personal items in her locker, a copy of the cover sheet of the Office's November 21, 1995 decision, a September 24, 2004 letter in which she requested that the employing establishment send her a copy of her entire personnel file and literature regarding an injury sustained while on duty.

By decision dated May 17, 2005, the Office denied appellant's March 13, 2005 request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>4</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>5</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>6</sup>

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> 20 C.F.R. § 10.607(a).

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>9</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>12</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.<sup>13</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>14</sup>

### ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>15</sup>

The last merit decision in this case was issued by the Board on October 23, 1998 which found that appellant was not totally disabled beginning June 25, 1993 due to her accepted

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<sup>7</sup> 20 C.F.R. § 10.607(b).

<sup>8</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>9</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>10</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>11</sup> *Leona N. Travis*, *supra* note 9.

<sup>12</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>14</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>15</sup> *Larry L. Litton*, 44 ECAB 243 (1992).

employment-related bilateral carpal tunnel syndrome and that she did not sustain an emotional condition while in the performance of duty. As her March 13, 2005 letter requesting reconsideration was made more than one year after the Board's October 23, 1998 merit decision, the Board finds that it was untimely filed.

The issues for purposes of establishing clear evidence of error in this case, are whether appellant submitted evidence establishing that there was an error in the Office's determination that she was not totally disabled beginning June 25, 1993 due to her accepted employment injury and that she did not sustain an emotional condition while in the performance of duty.

The Board finds that appellant's untimely letter requesting reconsideration fails to show clear evidence of error. She submitted Dr. Nordland's April 11, 2000 report which found that she still maintained a 12 percent impairment of the right upper extremity and a 10 percent impairment of the left upper extremity. Dr. Nordland opined that her current work restrictions were in effect and they were secondary to the above-noted limitations. In an October 19, 2004 report, Dr. Nordland indicated with an affirmative mark that appellant's carpal tunnel problems were caused by the December 5, 1984 employment injury and stated that she experienced persistent carpal tunnel problems in spite of surgical releases. The Board finds that Dr. Nordland's reports do not demonstrate clear evidence of error as they do not specifically address the underlying issue of whether appellant was totally disabled beginning June 25, 1993 due to the accepted employment injury or whether she sustained an emotional condition while in the performance of duty.

Dr. Nordland's medical reports and treatment notes which covered intermittent dates from August 31, 1992 to March 20, 1995, medical records regarding the treatment appellant received following her May 8, 1993 motor vehicle accident, correspondence from appellant's vocational rehabilitation counselor, the employing establishment and the Office regarding her ability to perform limited-duty work, the grievances filed by appellant against the employing establishment, the lists of jobs and associated duties, and personal items in her locker, a copy of the cover sheet of the Office's November 21, 1995 decision, her September 24, 2004 request for her personnel file and literature regarding an injury sustained while on duty were previously of record and considered by the Office and the Board. Duplicate evidence by itself does not raise a substantial question as to the correctness of the Office's denial of compensation.<sup>16</sup>

As appellant has not submitted any argument or evidence raising a substantial question as to the correctness of the Board's October 1, 1998 decision, the Board finds that she has failed to meet her burden of proof.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

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<sup>16</sup> The Board has held that the submission of evidence or legal argument that repeats or duplicates that already in the case record does not constitute a basis for reopening a case. *Denis M. Dupor*, 51 ECAB 482 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 17, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: January 13, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board